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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 261

ELIZABETH R. GRANVILLE-SMITH, *Petitioner*

v.

EDWARD GRANVILLE-SMITH, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR THE PETITIONER

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February 1, 1955.

INDEX

Page

I. The Basic Issue 1

II. The Practical and Legal Implications of the Statute .....

A. The Practical Implications .....

B. The Legal Implications .....

III. The Amicus' Position 5

IV. The First Provision: The Presumption of Domicile 12

A. The First Provision Retains the Domicile Requirement 12

B. The Procedural Presumption Is Valid 13

V. The Legislature Is Authorized to Enact the Statute 15

A. The Amicus' Position 15

B. The Statute Is Within the Authorized Legislative Power of the Virgin Islands 16

1. The Statute Is Not "Extra-territorial" 17

2. The Statute 19

3. Other Territorial Statutes 21

4. The Virgin Islands' Authority to Pass the Statute Is To Be Determined As If It Were a State 22

5. The Effect of the Due Process Clause 23

C. The Statute Does Not Conflict With the Tenth Amendment 25

VI. Full Faith and Credit 31

1. The Amicus' Position 31

2. Petitioner's Position 33

Page

a. In any event, the statutory provision does not violate any constitutional provision 38

b. Full faith and credit considerations do not invalidate the law 40

Conclusion 50

Appendix 51

TABLE OF AUTHORITIES

Cases:

Alaska Packers Ass'n v. Industrial Accident Commission, 294 U. S. 532 34
Alton v. Alton, 347 U. S. 610 ..... 5, 20
(The) American Insurance Co. v. Canter, 1 Peter 511 (1828) 28
Ashwander v. T. V. A., 297 U. S. 288 27
Berger v. Berger, 210 F. 2d 403 (C. A. 3, 1354) 4, 10, 13, 42
Berman v. Parker, 75 S. Ct. 98 27
Brown v. Board of Education, 347 U. S. 483 24
Buchanan v. Rucker, 9 East. 191 (1808) 18
Burch v. Burch, 195 F. 2d 799 (C. A. 3, 1952) 4, 10, 12, 15, 42
Case v. Bowles, 327 U. S. 92 ..... 27, 28
Cincinnati Soap Co. v. United States, 301 U. S. 308 27
Cook v. Cook, 342 U. S. 126 ..... 6, 39
Cope v. Cope, 137 U. S. 682 23
Craig v. Craig, 143 Kan. 624, 56 P. 2d 464 (1936) 7, 37
Crownover v. Crownover, 274 P. 2d 127 (N. M. 1954) 7, 36
David-Zeiseniss v. Zeiseriss, 129 N. Y. S. 2d 649, 205 Misc. 836 (Sup. Ct. 1354) 37
Duggan v. Bay Street Ry. Co., 230 Mass. 370, 119 N. E. 757 (1918) 14
Estin v. Estin, 334 U. S. 541 ..... 6, 46
Fernandez v. Weiner, 326 U. S. 340 27
First National Bank of Brunswick v. Yankton, 101 U. S. 129 27
Funk v. Multan Contracting Co., 197 Md. 192, 78 A. 2d 632 (1951) 18

Page

Gromer v. Standard Dredging Co., 224 U. S. 362 .. 23
Harris v. Municipality of St. Thomas & St. John, 212 F. 2d 323 (C. A. 3, 1954) 23
H. I. Hettinger Co. v. Municipality of St. Thomas, 187 F. 2d 774 (C. A. 3, 1951) 25
Home Insurance Co. v. Dick, 281 U. S. 397 42
Hooven & Allison Co. v. Evatt, 324 U. S. 652 27
Hopson v. Hopson, — F. 2d — (D. C. Cir. No. 11588, Jan. 20, 1955) 6
Inter-Island Steam Navigation Co. v. Territory of Hawaii, 305 U. S. 306 27
Johnson v. Manhattan Ry. Co., 289 U. S. 479 21
Johnson v. Muelberger, 340 U. S. 581 6
Klaxon v. Stentor Electric Mfg. Co., Inc., 313 U. S. 487 47
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 14
Mathews v. City of Chicago, 342 Ill. 120, 174 N. E. 55 (1930) 18
May v. Anderson, 345 U. S. 528 6
Maynard v. Hill, 125 U. S. 190 21
Mobile, J. & K. C. C. R. Co. v. Turnipseed, 219 U. S. 35 .....10, 13, 14
Mora v. Mejias, 206 F. 377 (C. A. 1, 1953) 30
Order of United Commercial Travelers v. Wolfe, 331 U. S. 586 46
Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U. S. 493 .....34, 46
W. C. Peacock v. Pratt, 121 Fed. 772 (C. A. 9, 1905) 23
People of Puerto Rico v. Eastern Sugar Associates, 156 F. 2d 316 (C. A. 2, 1946) 23
People of Porto Rico v. Rosaly y Castillo, 277 U. S. 270 23
People of Puerto Rico v. Shell, 302 U. S. 253 22
Rice v. Rice, 336 U. S. 674 .....13, 35
Shapiro v. United States, 335 U. S. 1 21
Shaw v. Fox, 246 Ky. 342, 55 S. W. 11 (1932) 18
Sherrer v. Sherrer, 334 U. S. 343 6
State v. Johnson, 170 N. C. 685, 86 S. E. 788 (1915) 18
Talbott v. Board of County Commissioners, 139 U. S. 438 27
Territory of Alaska v. Troy, 258 U. S. 101 28
Williams v. North Carolina, I, 317 U. S. 287 6
Williams v. North Carolina II, 325 U. S. 226 .....13, 38

STATUTES

FEDERAL STATUTES:

Page

28 U. S. C. § 1738 ..... 18, 31
48 U. S. C.
§ 77 21
§ 562 21
§ 731 (b) 21, 30
§ 821 21
§ 1391 19
§ 1405 a 22
§ 1405 q 19, 21
§ 1406 20
§ 1406 g 23, 25
§ 1541 22
§ 1574 (Sec. 8 (a), Revised Organic Act of the Virgin Islands, 1954) 15, 20
§ 1618 (Sec. 25, Revised Organic Act of the Virgin Islands, 1954) 13, 19, 20

Organic Act of 1936, Act of June 22, 1936, c. 699, 49 Stat. 1807 ..... 15, 19, 20, 21, 22, 23

STATE STATUTES:

Ark. Acts 1931, p. 201 9
Ark. Stat. (1947) § 34-1208 9
Fla. Laws 1935, p. 444 10
Fla. Stat. Anno. (1943) § 65.02 10
Idaho Sess. Laws, 1937, p. 131 5
Nev. Stat. 1931, p. 161 5
N. C. Sess. Laws 1943, p. 493 34
N. C. Gen. Stats. (1950) § 50-6 34
Utah Code Anno. (1953) § 30-3-1 10
Utah Laws 1943, p. 60 10
Wyo. Comp. Stat. (1945) § 3-5907 10
Wyo. Sess. Laws 1935, p. 25 10

MISCELLANEOUS:

I, II Annals of Congress 28
Conference Report on S. 3378, 83d Cong. 2d Sess., Rep. 2105 (July 9, 1954) 15
The Federalist 28

Page

General Assembly Resolution No. 748 (VIII), Cessation of the Transmission of Information Under Article 73 e of the Charter in Respect of Puerto Rico (Nov. 27, 1953) 30
Griswold, Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study, 65 Harv. L. Rev. 193 (1951) 7
House Com. Rep. 1603, 83d Cong. 2d Sess. 20, 30
Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Col. L. Rev. 1 (1945) 47
Kent, Commentaries on American Law, 119 (1823) 49
Mayers, Ex Parte Divorce: A Proposed Federal Remedy, 54 Col. L. Rev. 54 (1954) 35
Summary of Marriage and Divorce Statistics, U. S., 1953, Vol. 40, No. 3 (U. S. Dept. Health, Edu. & & Welf.) 3, 7, 18
Virgin Islands Report Relative to Investigation and Hearings, etc., Sen. Comm. on Interior and Insular Affairs, 83d Cong. 2d Sess., Committee Print (1954) 20
9 Wigmore, Evidence (3d ed. 1940) 14

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REPLY BRIEF FOR THE PETITIONER

I.

THE BASIC ISSUE

The distinguished Amicus Curiae, appearing by invitation of this Court, supports the conclusion of the court below, but, as we read his brief, deserts its reasoning. The majority below held that, under the due process clause, domicile, together with its essential element of domiciliary intent, is a constitutional requirement for

divorce jurisdiction. Because of this view, they held invalid the second provision of the statute under consideration which provides for jurisdiction without reference to domicile where both parties are before the court. And largely, we believe, because the majority below regarded domicile as constitutionally required for jurisdiction, they invalidated the first provision of the law, providing for a procedural presumption of domicile based solely upon proof of continuous presence.

The Amicus does not adopt this due process argument. He agrees with our view that the due process clauses of the Federal Constitution do not require domicile for divorce jurisdiction. He agrees that there is no provision of the Federal Constitution which prohibits a state or territorial legislature from making appropriate provision for divorce jurisdiction without domicile.

It is this due process issue that has heretofore been regarded as fundamental to this case.

On page 42 of his brief, the Amicus states:

> "It may be that a State is free to proceed in divorce matters without domicile if it chooses to do so".

Equivalent statements appear at page 8, page 36, and page 38. On page 21, the Amicus asserts the same proposition with respect to the Virgin Islands:

> "We are not dealing here with a case of long-continued residence which for some reason did not amount to domicile. *It might be that the Virgin Islands Legislative Assembly would have authority to deal with such a case.*"

The kernel of the Amicus' attack is that he believes that this Court should forbid the Virgin Islands to provide for divorce jurisdiction upon six weeks' continuous presence in the islands rather than a longer period. He urges the Court to reach this result by finding that Congress did not empower the Virgin Islands to pass such a law; or that if

it did, Congress exceeded its authority under the Tenth Amendment. If the Court declines to adopt either of these arguments, he suggests that the legislation may be invalidated under the full faith and credit statute applicable to the territories because of the presumed intent of the legislature that Virgin Islands law, and not the divorce statutes of other jurisdictions, should be applied to the determination of the issues in the divorce proceedings.

We believe that each of these arguments is insupportable, and we shall discuss them specifically. But underlying the Amicus' arguments is the assumption that the consequences and implications of the validation of this law would be so injurious to political, social and legal values of this nation as to impel this Court to overrule the judgment of the Virgin Islands legislature. We recognize that in the important field of divorce, any innovation justifies serious inquiry and sympathetic concern; but it is our deep belief that the effect of validation of this law will not be harmful, but will be productive of good. Our analysis is set forth in the following section.

II.

THE PRACTICAL AND LEGAL IMPLICATIONS OF THE STATUTE

A. THE PRACTICAL IMPLICATIONS

If this Court reversed the decision below, what would the consequences be?

1. In 1952, the Virgin Islands court granted 343 divorces. (Summary of Marriage and Divorce Statistics, United States, 1953, Vol. 40, No. 3, at 53 (U. S. Dept. Health, Edu. & Welf., Dec. 6, 1954)). This is its highest total for any single year. In 1951, its total was 312. (*Ibid*) In 1952, incomplete figures for the United States show a total of 392,000 divorces granted. (Id. at 51). The largest number was California, with 41,398 divorces. (Id. at 52).

We suggest that these figures indicate that Virgin Islands' divorces have not presented a major practical problem.

Prior to March 20, 1953, or at least prior to April 16, 1952, when *Burch* v. *Burch*, 195 F. 2d 799 (C. A. 3, 1952) was decided by the Court of Appeals, divorce petitions were entertained in the Virgin Islands without reference to domicile. (Pet. Br., pp. 7-8).

Since March 20, 1953, when the Virgin Islands' District Judge began vigorous enforcement of the domiciliary requirement laid down in *Burch*,[1] the volume of divorce petitions has declined.

We do not believe that approval of the present statute will make any great difference in the number of divorces granted in the Virgin Islands, as compared with 1952. In any event, we do not believe that the number will represent an important threat to any of the states.

Divorce in the Virgin Islands will not be easier than it was prior to *Burch* v. *Burch*. The period of residence or presence is unchanged. The Virgin Islands legislation requires six weeks of "continuous presence". This is a jurisdictional requisite. It is easily checked because of the remote and isolated position of the islands. Ingress and egress are recorded by the airlines and the steamships and can be checked in their records.[2]

Ample procedural safeguards are provided in the law and in practice.[3] The grounds of divorce are unchanged; and divorces obtainable in the Virgin Islands can alterna-

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[1] See *Berger* v. *Berger*, 210 F. 2d 403 (C. A. 3, 1954).

[2] This must be compared with the laws of Nevada and like jurisdictions which require six weeks "residence". This means "domicile". It does not necessarily require continuous presence for the prescribed period; and in any event, the geographical and transportation facts would make it difficult to check presence.

[3] See Pet. Br. pp. 22-25.

tively be secured in various states if the jurisdictional requirements are satisfied.[4]

2. We do not believe that if this law is declared valid, any effort will be made to reduce the residence requirement. Economic as well as social considerations would inhibit this. Indeed, validation of the present law would not necessarily imply approval of another law which provided for a lower and unprecedented period of residence. In the present law, the Virgin Islands merely continued an existing provision which had been in effect in St. Thomas-St. John since 1939, and which had been prescribed in Nevada since 1931 and in Idaho since 1937.[5] The continuation of this period, in our opinion, along with the general appearance of the defendant, establishes an adequate basis, or reasonable connection between the jurisdiction and the parties, for the Court to exercise its jurisdiction, and to apply the law of the forum; and for its decree to be entitled to full faith and credit. (See Pet. Br., pp. 42-51). It does not follow that if the Virgin Islands engaged in a competitive reduction of residence requirements, or otherwise lowered the residence period or other requirement of the law, the same conclusions would obtain.

3. We do not know whether other jurisdictions would adopt laws like the statute under consideration. It may be that Nevada, Florida and other "divorce" states are satis-

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[4] This is true not only of Nevada and other "divorce" states, but of many of the states which are not regarded as in this category. Reality is not always mirrored in the statutory grounds for divorce and parties to divorce proceedings usually allege and rely on the minimum and least distasteful grounds for divorce permitted by the forum, although other grounds may be available. *Cf.* the figures on divorces by states, *Appendix*. For example, the court will recall that the Altons who first sought a divorce in the Virgin Islands, on grounds of "incompatibility of temperament", were expeditiously divorced in Connecticut. *Alton* v. *Alton*, 347 U.S. 610. (See Connecticut decree in *Alton* v. *Alton* on file with the Clerk of this Court.)

[5] Nev. Stat. 1931, p. 161; Idaho Sess. Laws 1937, p. 131.

fied with their laws. We venture to suggest that adoption by various states of statutes patterned upon the Virgin Islands model, but retaining at least the present period of required residence, required by the respective jurisdictions, would be a wholesome reform because of the elimination of evasive or perjurious testimony which discredits the law and degrades its administration (See Pet. Br., pp. 31-32), and because of the greater certainty that would result.

4. We believe that a decision of this Court upholding the constitutionality of this statute will mark further progress along the road to enabling the attainment of a fair, comprehensible and practical legal structure within which legislative policy may evolve and judicial decision may operate with regard to the facts and the substantial values involved. This process began with the recognition by this Court of the unsuitability of the concept of "matrimonial domicile" to our society and the validation of divorces at the domicile of either spouse. *Williams* v. *North Carolina I*, 317 U.S. 287. It continued with the validation of divorces when both spouses appeared generally. *Sherrer* v. *Sherrer*, 334 U.S. 343; *Johnson* v. *Muelberger*, 340 U.S. 581; *Cook* v. *Cook*, 342 U.S. 126. It proceeded with the recognition of "divisible divorce":—of the separate factors involved in alimony, property and custody, on the one hand, and the severance of the marital relation on the other. *Estin* v. *Estin*, 334 U.S. 541; *May* v. *Anderson*, 345 U.S. 528.[6]

The present case presents to this Court an opportunity, in the second provision of the statute, to make clear that a legislature may dispense with the technical requirements of domicile in favor of an established period of continuous

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[6] The Court of Appeals for the District of Columbia, sitting *en banc*, held recently that an action for an original award of separate maintenance may be entertained in the District of Columbia *after* an *ex parte* Florida divorce without reaching the question of the validity of the foreign decree. *Hopson* v. *Hopson*, — F. 2d — (D. C. Cir. No. 11558, Jan. 20, 1955).

presence if the defendant is subject to the personal jurisdiction of the court, and that it may reduce the pitfalls and evasions of domicile where the statute carefully assures adequate notice and an opportunity, by special appearance, to contest the allegation of domicile.

More than 750,000 husbands and wives annually are involved in divorce proceedings in our country (See Summary of Marriage and Divorce Statistics, op. cit. p. 3, *supra*). This is a problem of major concern to our people and to our legal institutions. This Court should not close the door to substantive or procedural change. This is particularly true where, as here, the change is for the purpose of honesty and integrity in administration, and of clarity of standards and certainty in results.

B. THE LEGAL IMPLICATIONS

1. The Amicus stresses his apprehension with respect to the constitutional questions involved in this case (Am. Br. 25), *but those difficulties exist only if this legislation is declared unconstitutional.* They do not exist if it is upheld, as we shall discuss.

The Amicus has candidly recognized that the reasoning of the majority below on the domicile issue is legally untenable. He also appears to recognize that it is socially undesirable to hold that domicile is constitutionally necessary, because this result would make it impossible to deal with situations of the sort involved in the recent legislation of the United Kingdom,[7] or in such decisions as *Crownover* v. *Crownover*, 274 P. 2d 127 (N. M. 1954)[8] and *Craig* v. *Craig*, 143 Kan. 624, 56 P. 2d 464 (1936).[9] He is, therefore, forced to resort to an extraordinary application of the Tenth Amendment as a limitation upon the powers of Congress

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[7] See Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 Harv. L. Rev. 193, 197-200 (1951).

[8] See Pet. Br. 20.

[9] See Pet. Br. 38.

and the territories; or alternatively, to the equally extraordinary position that the full faith and credit rule invalidates a divorce statute, because the legislature enacting the statute improperly, he argues, assumed that the law of the forum would be applied.

We submit that nothing more than a reading of the brief of the learned and distinguished Amicus is necessary to an appreciation of the havoc that would result from a decision along the lines that he suggests.

2. A decision supporting the constitutionality of the statute may be based upon simple conclusions of limited scope and finite implications. These conclusions are:

(i) The power to define divorce jurisdiction and procedure is vested in the legislatures of the states and the territories. Constitutional restraints upon their action will be applied only in extreme situations.

(ii) Domicile is the traditional and a permissible basis for divorce jurisdiction. It is not an indispensable, nor a constitutional, requirement.

(iii) A legislature may provide for jurisdiction to divorce upon such grounds as it may determine, provided that its action is not clearly unreasonable or arbitrary. Where a legislature retains an established period of residence or continuous presence within the jurisdiction, and requires service within the district upon the defendant or a general appearance by him, the court will not invalidate its judgment, nor will it hold that the legislature has no power to create a procedural presumption of domicile where adequate provision is available for contest. In these situations, jurisdiction is based either upon domicile, in the case of the presumption, or upon a connection between the jurisdiction and the parties which the Court cannot characterize as unreasonable. The jurisdiction may continue to apply its own law to the determination of proceedings for divorce; and decrees under the law will be entitled to full faith and credit on the usual basis.

3. This reasoning will not open the door to "transitory" divorces, mail-order divorces, or any other of the consequences that the Amicus raises. It will not increase the alleged invasion of the supposed rights, interests or policies of the states. It does not in substance change the existing situation. It merely keeps open the door to legislative reform, subject to judicial scrutiny, and it validates the strongly felt policy of one jurisdiction, the Virgin Islands, in favor of integrity and candor in divorce proceedings.

III.

THE AMICUS' POSITION

The Amicus agrees that domicile is not a constitutional requirement for divorce jurisdiction, p. 2, supra. If this is so, it would seem to follow that a state or territorial legislature, if it chooses, may eliminate from its divorce law the requirement of proof of domiciliary intent where both parties are before the court; or alternatively, that it may create a procedural presumption of domicile to be available in the absence of evidence as to domiciliary intent.

The Virgin Islands legislature did just this in the statute before the Court. It did not change the six weeks period of residence or continuous presence in the jurisdiction previously required for divorce jurisdiction. This period has been prescribed by the laws of St. Thomas—St. John since 1939 (Am. Br. p. 14). It is the same as the period provided in Nevada since 1931; in Idaho since 1937 (fn. 5, *supra*). It is not materially different from the sixty-day residence which Arkansas has provided since 1931,[10] and

[10] Ark. Acts 1931, p. 201; Ark. Stat. (1947) §34-1208. We greatly regret that in the Brief for Petitioner, p. 21, fn. 23, we mistakenly included Arkansas among those jurisdictions which provide for divorce on the basis of six weeks residence. Arkansas requires two months residence before commencement of the action.

Wyoming since 1935,[11] or the ninety days required by Florida since 1935[12] and by Utah since 1943.[13]

The legislature merely provided that proof of six weeks continuous presence would raise a procedural presumption of domicile operative only if no contervailing evidence were adduced, and that in cases where the defendant is personally subject to the court, such residence would be sufficient to give the court jurisdiction. In substance, the Virgin Islands legislature acted merely to make unnecessary in certain cases the proof of domiciliary intent, characterized as "frequently evasive or perjurious" by the Court below, and proof of which the Amicus agrees is not necessary under the due process clause or any other clause of the Constitution.

The Amicus nevertheless argues that both provisions of the Virgin Islands statute are invalid. Apart from a fleeting endorsement of the argument of the majority below that the first provision of the statute (the procedural presumption) is invalid as unreasonable within the rule of *Turnipseed* (Am. Br. pp. 18-19), the legal and constitutional basis for his position is entirely novel and differs from that of the court below. He construes both provisions of the statute as dispensing with any requirement of proof of domicile and, in general, his argument deals with them without distinction. Because the statute requires only six weeks residence and not a longer period, the Amicus construes the law as if its scope and application were entirely confined to offering a remedy to persons resident in the states and not in the Virgin Islands.[14] Solely be-

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[11] Wyo. Sess. Laws 1935, p. 25; Wyo. Comp. Stat. (1945) §3-5907.

[12] Fla. Laws 1935, p. 444; Fla. Stat. Anno. (1943) §65.02.

[13] Utah Laws 1943, p. 60; Utah Code Anno. (1953) §30-3-1.

[14] The Amicus does not refer to the application of the statute to cases like *Burch* v. *Burch*, 195 F. 2d 799 (C. A. 3, 1952), or *Berger* v. *Berger*, 210 F. 2d 403 (C. A. 3, 1954), or to other cases where one or both of the parties are or become "domiciled" in the Virgin Islands.

cause of this implication which he derives from the limited residence requirement, he argues that the statute is beyond the authority of the Virgin Islands; and that it is beyond the powers which Congress could exercise or delegate because it is an unconstitutional interference with the states in violation of the Tenth Amendment. He urges the Court to decide the case on this ground in order to avoid constitutional issues. But if the Court declines to do so, he argues that the statute conflicts with the "requirements" of full faith and credit.

This is, of course, novel reasoning. It has never before been suggested in the cases involving the divorce laws of Nevada, Florida and other states—or in this case—that the Constitution required any particular period of residence or presence in a jurisdiction as a condition precedent to the exercise of power to hear and determine petitions for divorce. Even in this brief, the Amicus apparently does not attack the six weeks requirement in the laws of Nevada and Idaho where it is coupled with a requirement, however nominal in fact, of "domicile." But although he agrees that "domicile" is not constitutionally necessary, he argues that in the absence of domicile, the six weeks requirement (or presumably 60 days, as in Arkansas and Wyoming, or 90 days as in Florida and Utah, or perhaps six months as in North Carolina, would render a territorial statute offensive to the Federal Constitution. A "longer period", which the Amicus does not specify, or undefined "special and artificial" circumstances, according to the Amicus, might justify the departure from "domicile", (Am. Br. p. 37) but not the mere requirement of six weeks continuous presence even when coupled with the requirement that the defendant must be brought into the proceedings generally—a feature which the Amicus does not discuss.

IV.

THE FIRST PROVISION: THE PRESUMPTION OF DOMICILE

The Amicus agrees with the court below and petitioner that the statute contains two separate provisions (Am. Br. p. 2, Pet. Br. p. 9). However, contrary to the holding below, he construes the first provision, providing for a procedural presumption of domicile, as dispensing with the requirement of domicile (Am. Br. p. 20). Accordingly, he states that it is "not necessary" to consider the applicability of the law relating to presumptions (Am. Br. pp. 18-19), and he urges that the provision is invalid on the other grounds stated in his brief which are based upon the elimination of domicile. In a brief reference, however, he states that if it were necessary to apply the law of presumptions, the provision would be invalid thereunder.

A. THE FIRST PROVISION RETAINS THE DOMICILE REQUIREMENT

This provision of the statute retains the requirement of domicile as clearly as language could do so. Section 9 of the Divorce Law, which was unchanged by the statute in issue, is the general jurisdictional provision of the Divorce Law. It requires proof of domicile (*Burch* v. *Burch*, 195 F. 2d. 799 (CA 3, 1952). Section 9(a), the first provision of the amending statute, (the provision under discussion), provides that "if the plaintiff is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicile."

Plainly, the legislature intended by this provision to retain domicile as a jurisdictional requirement. This requirement is eliminated only when the *second* provision of the statute becomes operative: *i.e.*, only when "the defendant has been personally served within the district, or enters a general appearance in the action." In other circumstances, domicile is as essential as it is in any jurisdiction operating under conventional statutes.

The Amicus, however, argues that this is form and not substance. He says it is merely "lip service" paid to domicile. With this we thoroughly disagree. If the proceeding goes forth under the first provision, domicile is a jurisdictional fact with the following consequences:

1. The defendant may appear specially, by counsel or in person, or even by informal communication (see Pet. Br. pp. 23-24), and may contest domicile. The presumption disappears upon introduction of any countervailing evidence; and the court will decide whether or not the plaintiff is domiciled in the district, and will exercise or refuse to exercise jurisdiction accordingly.

2. The court itself may and frequently does conduct its own examination as to the plaintiff's claim of domicile. (Pet. Br., 24-25; *Berger* v. *Berger*, 210 F. 2d 403 (CA 3, 1954). The effect of this is the same as if the defendant conducted the examination.

3. A decree rendered under this provision—that is, *ex parte*, because the defendant has neither appeared nor been served within the district[15]—may be collaterally attacked for want of domicile. The absence of domicile may be proved in the usual fashion. Proof of the want of domicile would deprive the decree of recognition under the full faith and credit statute. (*Williams* v. *North Carolina* (II) 325 U. S. 226; *Rice* v. *Rice*, 336 U. S. 674).

In view of these facts, we submit that it cannot be argued that this provision "makes domicile immaterial where the defendant is not before the court" (Am. Br. p. 20).

B. THE PROCEDURAL PRESUMPTION IS VALID

The court below invalidated the presumption as unreasonable within the *Turnipseed* rule.[16] In our principal

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[15] St. Thomas—St. John is a district. St. Croix is a separate district. Revised Organic Act of the Virgin Islands of 1954, Section 25, 48 USC §1618.

[16] *Mobile, J. & K. C. C. R. Co.* v. *Turnipseed*, 219 U. S. 35.

brief, we analyze this problem at length, and urge that a rebuttable, procedural presumption of domicile based upon six weeks' continuous presence, where there is every safeguard to contest, is entirely reasonable. We point out that there is clearly "some rational connection between the fact proved and the ultimate fact presumed", as required by Turnipseed.[17] (Pet. Br. pp. 16-26).

In a few lines of his brief devoted to this subject the Amicus suggests that the presumption is unreasonable because it puts the burden "on the other party, who cannot possibly know as much about the facts relating to the plaintiff as the plaintiff does" (Am. Br. p. 19). The Amicus cites no cases, nor has our own research yielded any to support this original proposition. The power of the legislature to prescribe procedural rules and to create presumptions is extremely broad. See *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S., 61, 81. The application of due process depends upon a substantial showing that the person against whom a presumption operates is materially prejudiced. This does not turn upon questions of who is in possession of the facts, but upon a total consideration of the nature and effect of the presumption.[18] In a civil case, where the presumption has a rational basis; where it is entirely procedural and vanishes upon introduction of some countervailing evidence, it is not and cannot be prejudicial within the prohibitions of the due process clause.

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[17] 219 U. S. at 43.

[18] Many presumptions of undoubted validity have the effect of shifting the burden of going forward upon the less-informed party. For example: the presumption of ownership from continued possession of property (9 Wigmore *Evidence* Section 2515 (3d ed. 1940), and cases cited; cf. Id. Section 2522; the presumption of due care (*Duggan* v. *Bay State Street Ry. Co.*, 230 Mass. 370, 119 N. E. 757 (1918)), and in some cases, the presumption that a carrier is negligent (*Mobile* v. *J. & K. C. C. R. Co.* v. *Turnipseed*, 219 U. S. 35). See also the list of presumptions quoted in 9 Wigmore, Section 2499, n. 2, some of which are of the same character.

V.

THE LEGISLATURE IS AUTHORIZED TO ENACT THE STATUTE

A. THE AMICUS' POSITION

The Amicus principally relies upon his argument that the statute in issue is beyond the powers vested in the Virgin Islands by the Congress. He urges this Court to affirm the decision below on this ground "in order to avoid the grave constitutional questions which will have to be considered if this legislation is regarded as authorized by Congress" (Am. Br., p. 6; see also p. 18; p. 23; p. 25; p. 45).

The court below, exceptionally familiar with the Virgin Islands and with the applicable territorial and constitutional law,[19] had no doubt of the authority of the Virgin Islands to enact this law. (207 F. 2d at 669).

The argument of the Amicus is based upon Section 19 of the Organic Act of 1936, 48 U. S. C. § 1405 r. The text of this section is as follows:

> "The legislative power of the Virgin Islands shall extend to all subjects of local application not inconsistent with this Act or the laws of the United States made applicable to said islands, but no law shall be enacted which would impair rights existing or arising by virtue of any treaty entered into by the United States, nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents."[20]

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[19] The Court of Appeals for the Third Circuit holds an annual session in the Virgin Islands. The judges of the court have taken great interest in the islands over a period of years. Circuit Judge Hastie is former Governor of the Islands. The judicial section of the Revised Organic Act incorporates suggestions by Judge Maris (Conference Report on S. 3378, 83d Cong., 2d Sess., Rep. No. 2105, July 9, 1954). See Judge Maris' exhaustive review of the history of divorce legislation in the Islands in *Burch* v. *Burch*, 195 F. 2d 799 (CA 3, 1952).

[20] The Revised Organic Act, Section 8 (a), repeats this language almost verbatim. The first phrase now reads "The legislative *authority and* power of the Virgin Islands * * *." 48 U.S.C. § 1574, approved on July 22, 1954.

According to the Amicus, the present law does not deal with a "subject of local application" (Am. Br. pp. 19-23).

In addition, the Amicus urges that the due process clause in the Organic Act of 1936 limits the Virgin Islands to legislating within the areas of jurisdiction which were "traditional" in 1936. He states that "When this statute [the Organic Act] was passed in 1936, domicile was clearly a general basis of jurisdiction in divorce cases through the United States." (Am. Br., p. 24). Because of this, the Amicus argues that the Organic Act must be read as prohibiting the legislature from providing for divorce jurisdiction without requiring affirmative proof of domicile.[21] Accordingly, since the Amicus considers the first provision of the statute (providing a procedural presumption of domicile), as well as the second provision (providing for jurisdiction without reference to domicile where both parties are generally subject to the Court), as dispensing with domicile, he concludes that the law is "*ultra vires*".

These are extraordinary propositions. Their assertion is candidly motivated by a desire to provide this Court with a "way out". But it is a "way out" which would do violence to the meaning and intent of the Congress in respect of the Virgin Islands; reverse numerous decisions of this Court; subvert the commendable policy of the United States towards its territories—a policy which is of international significance; and create havoc in the Virgin Islands and in other territories such as Hawaii and Alaska and in the Commonwealth of Puerto Rico.

B. THE STATUTE IS WITHIN THE AUTHORIZED LEGISLATIVE POWER OF THE VIRGIN ISLANDS

There is no dispute as to the fact that the Virgin Islands legislature has power to enact a divorce law (See Am. Br., p. 22). The Amicus argues, however, that the

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[21] Except for this argument, as we read his brief, the Amicus does not rely upon the due process clause of the Organic Act or of the Fifth Amendment to support his thesis as to the statute's invalidity.

Congress intended, by provisions of the Organic Act to limit the Virgin Islands' authority to laws of "internal" application, and not to authorize laws of "external" or "extraterritorial" application; that this law is "external" in intended application; and that it is, therefore, *ultra vires*. The Amicus apparently realizes that this argument might also invalidate the laws of various states, conspicuously of the "divorce" states like Nevada and Florida, and he expressly reserves the question as to the states (Am. Br., p. 29; p. 17 (B)). He disagrees with the conclusion of the Court below that, in matters of divorce legislation, the power of the Virgin Islands is "on a par with the States."[22]

1. *The Statute is not "Extraterritorial".*

The basic premise of the Amicus' argument is novel and, in our opinion, completely insupportable. This is not an "extraterritorial" law. The obvious points are:

(a) It is of general applicability within the Virgin Island.[23] It is available to and used by persons born in

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[22] The Amicus states, p. 17, that it was "faulty analysis" for petitioner to omit the following italicized words from the opinion of the Court of Appeals (207 F. 2d at 669):

> "Absent restrictions elsewhere, such a grant of power to a territory places it on a par with the States *as to all matters properly included in the grant.*"

But in the paragraph immediately following the Court of Appeals omitted the italicized words:

> "We think this language applied to divorce jurisdiction, puts the Virgin Islands on a par with the states, and overrides other restrictive provisions in Congressional legislation affecting the territories."

Elsewhere in its opinion, the Court noted that it was "analogizing the Virgin Islands to a state." 207 F. 2d at 676, fn. 30.

[23] A law is local when it pertains to a particular place or region, although it may be applicable to all persons within the area.

the islands and persons married there and residing there for many years,[24] as well as others. It may be invoked only by a plaintiff who is in the Virgin Islands and who has lived there for the prescribed period, and only in order to obtain an adjudication of his personal marital status.

(b) The effect of the law is exclusively internal. The law authorizes a decree operative in the Virgin Islands. It does not purport to, and could not, give decrees under it any extraterritorial effect. Any effect of such decrees outside of the Virgin Islands is derived from the action and authority of other governments: for example, as a result of the full faith and credit statute[25] or of comity.[26]

These propositions, we believe, are so clear that they

Funk v. *Mulian Contracting Co.*, 197 Md. 192, 78 A. 2d 632 (1951); *State* v. *Johnson*, 170 N.C. 685, 86 S.E. 788, 792 (1915); *Shaw* v. *Fox*, 246 Ky. 342, 55 S.W. 11 (1932); *Mathews* v. *City of Chicago*, 342 Ill. 120, 174 N.E. 35 (1930).

[24] In 1952, 237 marriages were celebrated in the Virgin Islands. Summary of Marriage and Divorce Statistics, op. cit. p. 3, *supra*, at p. 53. An examination of records on file with the District Court of the Virgin Islands shows that its divorce jurisdiction is frequently invoked by persons who were born in the islands and have lived there all of their lives, as well as by persons who, although not natives, were married there.

[25] Act of March 27, 1804, c. 56, Sec. 2, 2 Stat. 298, 299; 28 U.S.C. § 1738.

[26] The Amicus cites *Buchanan* v. *Rucker*, 9 East. 191 (1808), "Can the island of Tobago pass a law to bind the rights of the whole world?" (Am. Br., p. 22). In that case, an English court refused to enforce a judgment *in personam* for money damages rendered in the Island of Tobago against a Defendant who, in the words of the Court, "never appeared to have been within the limits of the Island nor to have an attorney there," and who was served by a notice posted on the courthouse door on the Island. We agree that the Island of Tobago can bind no one by this sort of proceeding.

require no elaboration. The real argument of the Amicus seems to be that this law exceeds the delegated power of the legislature because it was not passed to meet a need of "Virgin Islanders", but to attract from elsewhere people seeking divorces. This may raise problems of federal constitutional law and policy such as those dealt with by the majority of the court below; but we submit that it does not render the statute one of "extraterritorial" character or beyond the limits of the Organic Act. On the contrary, it seems perfectly clear that the statute is well within the power of the Virgin Islands.

2. *The Statute.*

a. Congress intended to and did vest in the legislative assembly of the Virgin Islands legislative authority of a scope and character, with minor qualifications not material here, the same as is possessed by the states. The language used in the Organic Act of 1936 and substantially repeated in the Revised Organic Act of 1954, was intended as a plenary delegation of congressional power, with reservations not here relevant, to legislate for the islands. The limitation to "subjects of local application" is designed to make clear that Congress is not delegating federal or national power, but only "home-rule" authority.

The first statute enacted by the Congress to provide a temporary Government for the Virgin Islands, vested "all military, civil and judicial powers necessary to govern the West Indian Islands acquired from Demark" in officials appointed by the President until such time as Congress should provide for government of the Islands. (Act of March 3, 1917, c. 171, § 1, 39 Stat. 1132, 48 U.S.C. § 1391).

This law was superseded by the Organic Act of 1936, Act of June 22, 1936, c. 699, 49 Stat. 1807. In addition to Section 19, quoted p. 15, *supra*, Section 18, 48 U.S.C. § 1405q, provided generally that the municipal councils and the legislative assembly, within their respective jur-

isdictions, shall have power "to amend, alter, modify, or repeal any law of the United States of local application only, or any ordinance, public or private, civil or criminal, continued in force and effect by said sections, except as herein otherwise provided, and to enact new laws and ordinances not inconsistent with said sections and not inconsistent with the laws of the United States hereafter made applicable to the Virgin Islands or any part thereof, subject to the power of Congress to annul the same." Section 28, 48 U.S.C. § 1406, defining the jurisdiction of the District Court, expressly specified "All cases of divorce and annulment of marriage." And Section 19 itself, by excepting from the legislative power authority to enact law impairing rights existing or arising under United States treaties, emphasizes the breadth of the delegation.

In 1954, the Congress enacted the "Revised Organic Act of the Virgin Islands" which in Section 8 (a) substantially reenacts Section 19 of the 1936 law. Two points are to be noted in connection with this reenactment. (i) One of its general objects was to confer "a higher degree of self-government, both economic and political" upon the Virgin Islands. (House Com. Rep., 1603, 83d Cong., 2d Sess.) (ii) No amendment of the divorce law at issue here was made or even proposed in the elaborate consideration of the revised act, although the Committee were undoubtedly fully aware of it.[27] Congress, of course,

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[27] Virgin Islands Report Relative to Investigation and Hearings, etc., Sen. Comm. on Interior and Insular Affairs, 83d Cong., 2d Sess., Committee Print (1954), pp. 54-55, letter from Judge Moore. The "Table of Contents and Partial Index" to the Report lists Judge Moore's letter under the heading "Divorce law of the Virgin Islands". Senator Butler of Nebraska, chairman of the committee, conducted extensive hearings and investigations in the islands in November, 1953, when *Alton* v. *Alton* was pending. *Id.* at 2. Other members of the Senate and House committees visited the islands.

has the power to annul laws of the Virgin Islands. (Cf. 48 U.S.C. § 1405q in which Congress expressly retained power to annul laws of Legislative Assembly). Its re-enactment of the Revised Organic Act may be regarded as ratification of the divorce law here in issue.[28]

3. *Other Territorial Statutes.*

Equivalent phrases used by Congress in other territorial organic legislation make clear that it has been the consistent policy of the Congress to grant full "home rule", and also illustrates that there is no absolutely felicitous phrase to accomplish the result.

In the Territory of Oregon, for example, the organic law provided that the legislative power of the assembly would "extend to all rightful subjects of legislation . . ." In *Maynard* v. *Hill*, this was held to authorize the granting of a divorce "when either of the parties divorced was at the time a resident within the territorial jurisdiction of the legislature." (125 U.S. 190, at 209).

The same words are used to define the scope of the legislative power of Alaska[29] and Hawaii.[30] In legislating for Puerto Rico, the Congress provided that the legislative authority "shall extend to all matters of a legislative character not locally inapplicable . . ."[31] All of these laws,

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[28] It may also be regarded as ratification of, or certainly acquiescence in, the construction of the Organic Act by the Third Circuit, and perhaps specifically of its view that the power of the Virgin Islands legislature in the premises is on a par with the states. Cf., *Shapiro* v. *United States*, 335 U.S. 1, 16; *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 500.

[29] Act of June 3, 1948, c. 396, 62 Stat. 302; 48 U.S.C. § 77.

[30] Act of June 9, 1926, c. 512, §§ 1, 2, 44 Stat. 710, 711; 48 U.S.C. § 562.

[31] Act of May 17, 1932, c. 190, 47 Stat. 158; 48 U.S.C. § 821. This is still the definition of the legislative authority of the Commonwealth of Puerto Rico organized pursuant to a "compact". Act of July 3, 1950, c. 446, § 1, 64 Stat. 319, 48 U.S.C. § 731 (b).

as we shall discuss, confer full powers, "on a par with" or equivalent to the states, to legislate on the subject of divorce.

4. *The Virgin Islands' Authority to pass the Statute is to be Determined as if it were a State.*

The Amicus reserves judgment as to whether a state would be acting, so to speak, *ultra vires*, if it enacted a divorce law, the purpose of which is, on the Amicus' assumption, to invite people from outside the state to use its courts. (Am. Br., p. 29). We believe that the statutes of Nevada, Florida, Idaho, Arkansas, Utah and Wyoming cannot be attacked as beyond the authority of those states, even though it may be argued that their purpose is in part to invite strangers to come to these states, to remain there for at least the minimum period that the laws prescribe, and possibly to settle there. And since we believe it is to be clear that the power of the Virgin Islands legislature in the premises is the same as that of a state, its statute cannot be held to be *ultra vires*.

Under the 1936 Organic Act, the Virgin Islands were an "insular possession" (48 U.S.C. § 1405a) with an organized government. Under the 1954 revision, although the major structure and the powers of the government are not changed, the islands are referred to as "an unincorporated territory" (Section 2(a), 48 U.S.C. § 1541).[32]

In the case of Puerto Rico which was then an unincorporated territory with a basic structure like that of the Virgin Islands, this Court unequivocally affirmed the comprehensive scope of legislative power conferred by language similar to that in Section 19 of the Virgin Islands Organic Law, and has adverted to its similarity to state power. The following quotations are from *People of Puerto Rico* v. *Shell*, 302 U.S. 253, 261-2:

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[32] The different nomenclature is of symbolic, but not of relevant legal importance. This Court has always, in construing territorial law, observed the substance of the powers granted and the problems involved, rather than the terminology.

"The grant of legislative power in respect of local matters . . . [matters of a legislative character not locally inapplicable] is as broad and comprehensive as language could make it."

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"The aim of the Foraker Act and the Organic Act was to give Puerto Rico full power of local self-determination with an autonomy similar to that of the states and incorporated territories. [citing cases] The effect was to confer upon the territory many of the attributes of quasi sovereignty possessed by the states—as, for example, immunity from suit without their consent. People of Porto Rico v. Rosaly y Castillo, supra."[33]

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"And so far as local matters are concerned, as we have already shown in respect of the continental territories, legislative powers were conferred nearly, if not quite, as extensive as those exercised by the state legislatures."

Similar characterizations of the scope and nature of territorial power appear in numerous opinions of this and inferior Courts. *People of Porto Rico* v. *Rosaly y Castillo*, 277 U.S. 270, quoting with approval *Gromer* v. *Standard Dredging Co.*, 224 U.S. 362, 370; *People of Puerto Rico* v. *Eastern Sugar Associates*, 156 F. 2d 316, 321 (C.A. 2, 1946); *Cope* v. *Cope*, 137 U.S. 682 (Utah Territory); *W. C. Peacock* v. *Pratt*, 121 Fed. 772 (C.A. 9, 1905) (Hawaii).

5. *The Effect of the Due Process Clause.*

The Amicus claims that Section 9 (a) violates the due process clause of the Organic Act[34] because when that

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[33] The Virgin Islands is immune from suit without its consent. *Harris* v. *Municipality of St. Thomas and St. John*, 212 F. 2d 323 (CA 3, 1954).

[34] "No law shall be enacted in the Virgin Islands which shall deprive any persons of life, liberty or property without due process of law or deny to any person therein equal protection of the laws." 48 U.S.C. § 1406 (g).

"statute was passed in 1936, domicile was clearly a general basis of jurisdiction in divorce cases throughout the United States." (Am. Br., p. 24). He argues that it must, therefore, be concluded that Congress intended to confine the legislative assembly to the enactment of divorce legislation "within the limits of due process as that term was understood in 1936" (*Ibid*). As we have pointed out, the Amicus does not contend that the elimination of a domicile provision substantively offends the due process clause. His argument is confined to the point that it operates as a *limitation* of the congressional authorization in the 1936 Organic Act.

We pointed out in the "Brief for the Petitioner", pp. 33-35, that domicile was not a fundamental principle of justice when the Fifth Amendment was adopted in 1791, and that this Court has never ruled that it is an indispensable ingredient of due process under the Fourteenth Amendment.

In the first place, as our preceding discussion shows, we are of the opinion that the evidence is overwhelming that the Congress intended to vest the Virgin Islands with power over divorces as complete and as broad in scope as that possessed by the states. Specifically, we again point out the reenactment in 1954 of the relevant provisions of the 1936 Organic Act, including the due process clause and the grant of legislative powers, as indicating the absence of affirmative desire on the part of Congress to avoid or restrict the law here in issue.

In the second place, we believe it to be clear that the due process clause does not freeze legislative power to subjects or types of legislation in vogue at the time of its enactment or adoption. Cf. *Brown* v. *Board of Education*, 347 U.S. 483, 492. We confidently assume that the distinguished Amicus does not mean that the due process clause of the Fifth or Fourteenth Amendments similarly confines the powers of the federal and state governments. His argument must be that the due process clause in the Organic Act was intended by Congress to have a peculiar,

limiting effect which is different from the effect of a constitutional provision.

We see no basis for this argument. The due process clause in the Organic Act was included as part of the familiar, traditional United States bill of rights (48 U.S.C. § 1406g). It had and has no peculiar meaning or exotic significance.

We have found only one case which is in point. In *H. I. Hettinger Co.* v. *Municipality of St. Thomas*, 187 F. 2d 774 (C.A. 3, 1951), plaintiff resisted the imposition of Virgin Islands' local taxes on the ground that it was engaged in performance of a contract for the United States government. The taxes were a sales tax and a tax on persons licensed to do business, measured by gross receipts. Plaintiff claimed that the Organic Act of 1936 did not permit imposition of the taxes upon it, because in 1936, such taxes could not, under decisions of this Court, have been imposed upon it. This Court subsequent to 1936 overruled its prior decision. Plaintiff argued that, in passing the Organic Act, Congress conferred only those powers which could be lawfully exercised at the time the law was enacted, and that subsequent developments could not enlarge those powers.

The Court of Appeals complimented counsel upon the "ingenuity of the argument"; but it held that the tax could be collected against plaintiff.

There is no doubt that the due process clauses of the Organic Act and of the Fifth Amendment are controlling upon the Virgin Islands; but we confidently submit that they do not limit the scope of its legislative power to the enactment of laws of a type that were familiar in 1936.

C. THE STATUTE DOES NOT CONFLICT WITH THE TENTH AMENDMENT

The Amicus argues that if the statute is within the authorization of Congress, it is invalid under the Tenth Amendment (Am. Br., 29-34). His argument, as we understand it, is again based on the assumption that the statute

is to be construed as "extraterritorial", an assumption discussed above. He, therefore, views the law as an attempted interference with the authority of the States "in the area of marriage and divorce". (Am. Br., p. 30).[35] Accordingly, he concludes that Congress should not merely disapprove of the law "as a matter of comity or discretion", but that the law is invalid because of "the implications of a Federal system, buttressed by the Tenth Amendment."[36]

Again, we point out that the effect of the Virgin Islands law, *ex proprio vigore*, is entirely domestic. If it is to have effect in other jurisdictions, that is because of the authority and action of other jurisdictions under the full faith and credit statute or principles of comity. We deal with these points hereinafter. The Amicus, however, seems to argue that, apart from any question of recognition of the decrees outside of the Virgin Islands, the mere availability of jurisdiction on the basis provided the statute is an interference with state power under the Tenth Amendment.

There is clearly no warrant in law for this position. The Tenth Amendment has nothing to do with the exercise by the Congress of enumerated powers, and particularly of its power under the territories clause of the Constitution (Art. IV, § 3) or otherwise in providing for the territories. We believe that this is settled law.

In a case involving the disposition of property, the Court has held that the Tenth Amendment does not restrict the exercise of congressional power under Article

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[35] We assume that the Amicus does not condemn the marriage laws of the Virgin Islands although they are generous and may be attractive to persons from the states.

[36] Here again, the Amicus does not resolve the question as to whether the legislation of Nevada *et al.* would be invalid, by parity of reasoning, as an unconstitutional interference with other states. See Am. Br. 31.

IV, § 3. *Ashwander* v. *T.V.A.*, 297 U.S. 288, 330. That case exemplifies the rule that the

> "* * * Tenth Amendment 'does not operate as a limitation upon the powers, express or implied, delegated to the national government.'" *Case* v. *Bowles*, 327 U.S. 92, 102; *Fernandez* v. *Weiner*, 326 U.S. 340, 362.

Particularly is this true with respect to the power of Congress in dealing with the Territories and Possessions of the United States. Congress in so legislating

> "is not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union." *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 323.

In *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 674, this Court stated:

> "In exercising this power [conferred by § 3 of Article IV], Congress is not subject to the same constitutional limitations as when it is legislating for the United States."

The territories, in other words, are subject to the "absolute supervision and control" of Congress, *Talbott* v. *Board of County Commissioners*, 139 U.S. 438, whose power in this area is "full and complete". *First National Bank of Brunswick* v. *Yankton*, 101 U.S. 129. See also *Inter-Island Steam Navigation Co.* v. *Territory of Hawaii*, 305 U.S. 306, 314. Congressional power over the District of Columbia is equally extensive. As this Court recently stated, "it includes all the legislative powers which a state may exercise over its affairs." *Berman* v. *Parker*, 75 S. Ct. 98, 102.[37]

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[37] This Court has repeatedly refused to hold that various constitutional limitations otherwise applicable to Congress are controlling when Congress is legislating for the Territories. So, for example, the requirement imposed by Article III that admiralty and maritime jurisdiction be conferred only upon constitutional

The reliance of the Amicus upon generalizations expressed by James Madison in *The Federalist* in 1788 is misplaced. Madison presented the first ten amendments in their original form to the House of Representatives on June 8, 1789. I *Annals of Congress* 424, 433. He unambiguously indicated his views of the effect of the Tenth Amendment upon the powers of Congress during the congressional debate in 1791 on the bill to incorporate the United States Bank (II *Annals of Congress* 1897):

> "Interference with the power of the States was no constitutional criterion of the power of Congress. As the power was not given, Congress could not exercise it; *if given, they might exercise it, although it should interfere with the laws, or even the Constitutions of the States.*" (emphasis supplied).[38]

Indeed, the Amicus' argument raises an interesting question as to whether he would consider legislation by the Congress under authority of the full faith and credit clause, to compel recognition of divorce decrees, to be invalid. A declaration by Congress that full faith and credit must be accorded in every state to a decree dissolving the marriage where the defendant was personally subject to the jurisdiction of the court or appeared generally (such as

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courts is inapplicable to the Territories. *The American Insurance Co.* v. *Canter*, 1 Peter 511 (1828). The Court has also held that the interdiction in Article I, Section 9 against conferring any preference upon the ports of one state over those of another has no application to the territories. *Territory of Alaska* v. *Troy*, 258 U.S. 101. If the explicit limitations of the judiciary article and the ports-preference clause do not apply in the case of the territories, it would seem clear that the generalized prohibitions in the Tenth Amendment do not inhibit Congress.

[38] The exercise by Congress of its enumerated powers will inevitably have an effect upon state power. Congress could not normally prescribe the price at which state timber can be sold, this Court upheld its authority to do so under the war power. *Case* v. *Bowles*, 327 U.S. 92.

the proposed legislation, discussed in Pet. Br., p. 39) would, of course, affect the states with respect to divorce in the way to which Amicus objects.

We do not, of course, suggest that there are no limitations upon the power of Congress in dealing with the territories, or that there may not be instances where territorial legislation would be invalid as an unjustifiable encroachment upon state authority. But we submit that the Tenth Amendment is irrelevant, and that the standard to be used in the present case is the same as that used to determine the validity and effect of state legislation which is charged with impingement upon the jurisdiction of other states. Judged by this standard, as we elsewhere argue, the Virgin Islands statute is entirely valid, just as the statutes of Nevada and other states are constitutionally unobjectionable.

D. THE IMPLICATIONS OF AMICUS' POSITION.

If this Court should hold, on the basis of any of the Amicus' arguments, that the statute in issue is beyond the powers of the Virgin Islands or beyond the powers which Congress could exercise or delegate in respect of the Virgin Islands, the consequences would be extremely destructive. The result would be to narrow the extent of territorial home-rule, and to jeopardize a number of important territorial powers and programs.

For example, both the Virgin Islands and Puerto Rico have programs of tax exemption or rebate and subsidies, designed to attract persons and industries in the states to locate businesses in the areas. In Puerto Rico, the program has had spectacular success under the descriptive title "Operation Bootstrap". Sometimes these programs result in the abandonment of factories in the states and their relocation in the islands. Are these programs "extraterritorial", *ultra vires* or unconstitutional as an interference with important interests and policies of the states?

Puerto Rico has a price control program, operative as to certain articles imported from the states as well as others.

The regulation of rice prices, for example, vitally affects a concern of California and other states. If the Amicus is correct, is Puerto Rico exceeding its authority, or is the law unconstitutional for this reason? *Mora* v. *Mejias*, 206 F. 2d 377 (C.A. 1, 1953).

It is unnecessary to multiply examples. The basic fact of the matter is that Amicus' argument would, if accepted, jeopardize or reverse the policy of this nation and critical programs of the various territories and the commonwealth of Puerto Rico.

The policy of this nation, by and large, with respect to its territories is and has been a proud page in history. The broad powers of self-government that we have progressively extended to our dependencies have been a notable and beneficial factor in the current and critical international debate concerning colonialism. For example, the report of the State Department on the Revised Organic Act of the Virgin Islands notes that "Such action by the United States to develop further the self-governing institutions of a territory under its administration serves to support the objectives of American foreign poicy and to strengthen the position of the United States in international affairs."[39]

Although the newly-created Commonwealth of Puerto Rico is still subject, by the terms of compact (Act of July 3, 1950, 64 Stat. 319, 48 U.S.C. § 731 (b)) to the provision that its legislative power "shall extend to all matters of a legislative character not locally inapplicable", the United States Government has advised the United Nations that Puerto Rico has a full measure of self-government, and the United Nations has acted accordingly. (General Assembly Resolution No. 748 (VIII), Cessation of the Transmission of Information Under Article 73 e of the Charter in Respect of Puerto Rico (Nov. 27, 1953)). This, of course, was based upon the assumption, as the official communications show, that the quoted phrase gave Puerto Rico at least the powers of a State of the union.

[39] H. R. Rep. No. 1603, 83d Cong., 2d Sess. 21 (1954).

We regret that the distinguished and justly honored Amicus has arrived at the conclusions which he has stated with respect to territorial power. Our own view, based upon long association with this problem, is that the reasoning which the Amicus strongly urges this Court to accept in order to avoid problems, would be exceedingly destructive to values of fundamental importance.

VI.

FULL FAITH AND CREDIT

1. THE AMICUS' POSITION.

The brief of the Amicus Curiae argues that if the Court declines to rule that the statute exceeds the authority of the Virgin Islands legislature or of Congress, it should hold that the law is invalid because "it fails to recognize the obligations of the full faith and credit clause."[40] (Am. Br. p. 34, headnote to B). His argument is that the statute assumes, although it is silent on the matter, that Virgin Islands substantive law will be applied to divorce proceedings before its court; and he asserts that the application of Virgin Islands law, rather than the law of the domicile or the state with which the parties are "connected", would be contrary to full faith and credit requirements. He bases this conclusion as to the law to be applied, upon the fact that the statute does not require a longer period of residence than six weeks. Six weeks, he asserts, at least in the absence of "domicile", does not constitute a "reasonable connection" between the parties and the forum. (Am. Br. pp. 34-44). The Amicus acknowledges that "the Full Faith and

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[40] As the Amicus recognizes, the full faith and credit clause of the Constitution does not apply to the territories or the Congress (Art. IV, sec. 1; Am. Br., p. 34). The only full faith and credit requirement applicable to the territories is statutory. 28 U.S.C. § 1738. We make no argument based on this, since we believe that, regardless of interesting possibilities of technical refinements, the territories should be treated as on a par with the states for all purposes relevant to this case.

Credit clause has not been regarded as having application to divorce legislation". (Am. Br. p. 35).

It is first essential to note that the Amicus' full faith and credit point is *not the same, but is the reverse* of that made by the majority below. The majority did not mention the novel proposition that the statute might be invalidated because it did not require the application of the law of some other jurisdiction. They were of the equally novel, but quite different, opinion that the statute was invalid *because the various states would not be required to grant full faith and credit to a decree under its provision.* They felt that in this type of case, a decree not entitled to compulsory recognition abroad was invalid at home, under the due process clause. The majority candidly acknowledged that their reasoning was without the support of precedent.[41] The Amicus agrees with our contention that this point is not involved in the present case. (Am. Br. p. 42).

The Amicus does not discuss the majority's argument, and he does not rely upon the due process clause in this connection. Indeed, we must confess to uncertainty as to the Amicus' position. It appears to be confined to the point that full faith and credit prohibits the Virgin Islands, under this statute, from applying its own law, and that the statute is therefore unconstitutional. Apart from the problem as to choice of law, he does not appear to argue that full faith and credit considerations render the law unconstitutional because it provides for jurisdiction in the alleged absence of a "substantial and real connection" between the Plaintiff and the Virgin Islands. For example, at p. 40, the Amicus states: "The Full Faith and Credit clause does not deprive the State of the forum of jurisdiction to hear the case, but it does require that the State should apply the law which is intimately connected with the contract."

In any event, we shall discuss both propositions: (i) that the failure to provide for application of the law of some other jurisdiction makes the law unconstitutional;

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[41] The majority's argument is discussed in Petitioner's Brief, pp. 28-50.

and (ii) that authorizing jurisdiction in the asserted absence of a requisite "connection" is unconstitutional.

At the outset, however, we wish to recall that in our view, Amicus' argument involves only the second provision of the statute which provides for jurisdiction in the absence of domicile. If domicile is required (as it is under the first provision), presumably, although it is not entirely clear, Amicus would not make either the choice-of-law or the "substantial and real connection" arguments even though the "domicile" statute required only six weeks residence and, unlike the second provision of the present statute, were available *ex parte*. (See Am. Br. bottom of pp. 35 to 36).

2. PETITIONER'S POSITION.

Our own analysis of the constitutional problems raised and suggested by the Amicus is aided by regarding them as involving not only full faith and credit considerations, but also due process.[42] In our principal brief, we have adverted to the possibility that due process considerations may not be applicable to this case "because no person is being deprived of any rights". (Pet Br. pp. 27, 28; see Am. Br. p. 24). We are still of the opinion, as we hereinafter note, that this is a serious obstacle.

The Amicus is in accord with our view contrary to the holding below, that the due process clause does not prohibit a legislature from providing for divorce jurisdiction in the absence of domicile (Pet. Br. pp. 28-42; Am. Br. pp. 8, 21, 36, 38, 42). Instead, he seems to suggest that a "reasonable connection" or a "substantial or real connection" should be the test upon which constitutionality depends.[43]

[42] We suggest the relevance of due process with some diffidence, in view of the fact that the Amicus does not make the point. We have the highest regard for the Amicus and the greatest deference to his extensive learning and experience in this field.

[43] This is his contention with respect to the choice of law and the authority of the Virgin Islands to pass the statute. We shall discuss it on the broader, and, we think, more fundamental basis described above.

Our principal point in answer to this suggestion is that even if this standard were imported into our constitutional system, the present statute must be held to be valid. The determination of what constitutes a reasonable or a substantial and real connection is a function of the legislatures of the several states and territories. It is subject to judicial nullification only if it grossly exceeds extremely wide limits of tolerance. See *Pacific Employers Insurance Co.* v. *Industrial Accident Commission*, 306 U.S. 493; *Alaska Packers Ass'n* v. *Industrial Accident Commission*, 294 U.S. 532.

In the present case, the Virgin Islands legislature has retained unchanged the previously effective period of residence or continuous presence: six weeks. This has been in effect in the largest part of the islands since 1939 and throughout the jurisdiction since 1944. It is the same period that has been required in Nevada since 1931 and Idaho since 1937. It is not materially different from the 60-day period provided for in Arkansas since 1931, and Wyoming since 1935; or the 90-day period provided in Florida since 1935, and in Utah since 1943; or the six months' period provided in North Carolina since 1943.[44]

Moreover, this legislation in the provision dispensing with the need of domicile, requires a type of "substantial and real connection" between the parties and the jurisdiction which is *not* required in conventional domicile jurisdictions and which is of the utmost importance to the real values involved. It not only requires a "connection" between the *plaintiff* and the jurisdiction, but it also requires a "connection" between the forum and the *defendant*. Jurisdiction under this provision is not available *ex parte*. It is available only if the defendant is brought into the proceedings by personal service within the district or by a general appearance. We submit that this provision, which strikes at one of the great evils that beset divorce pro-

[44] N. C. Sess. Laws 1943, p. 493; N. C. Gen. Stats. (1950) § 50-6.

ceedings,[45] is much more important and much more commendable than the spectral, illusive and frequently insincere "connection" between the plaintiff and the forum which is supposedly furnished by domiciliary intent.

We may or may not, as a matter of personal judgment, believe that divorce jurisdiction should be available upon six weeks' residence. We may or may not believe that in our extraordinarily complex federal system and our societey, in which the needs are many and subtle, there is need or justification for this sort of provision. Whatever may be our views as to this complicated problem, it is clear that judgment, within broad limits of tolerance, should be entrusted to the relatively flexible and responsive processes of legislation and not to the strictures of constitutional imperatives.

This does not mean that legislatures may engage in reductions of the required period of residence without any check or control. Apart from the sentiment of their own communities, there is the fact that the Congress may, by legislation under the full faith and credit clause, exert powerful influence on the limits of divorce laws through the medium of prescribing the effect to be given decrees by other states. In the second place, this Court has power effectively to frustrate legislation which so radically departs from prevailing standards as to shock the conscience or to violate basic conceptions of minimum procedural proprieties. And, of course, in the case of the Virgin Islands Congress can apply the residence requirements directly at any time.

The Amicus, however, does not believe that the Virgin Islands statute requires the requisite degree of connection. He believes that six weeks residence is not enough. Two points are to be noted here: (1) The Amicus does not discuss the effect, upon the reasonableness of the connection,

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[45] See *Rice* v. *Rice*, 336 U.S. 674, 678 (Jackson J., dissenting); Mayers, *Ex Parte Divorce: A Proposed Federal Remedy*, 54 Col. L. Rev. 54, 55-58 (1954).

of the requirement that the defendant, as well as the plaintiff, must be subject to general jurisdiction. His failure to comment on this is possibly due to the fact that he believes, we think incorrectly,[46] that the first provision of the statute which would permit *ex parte* proceedings, also dispenses with domicile. (2) The Amicus does not make clear just where he thinks the line should be drawn to separate the permissible from the forbidden. He says (Am. Br. p. 38):

> "If the test is not domicile, then what are its limits? That need not be decided here. It is enough to decide here that a State cannot apply its own law, consistently with the Full Faith and Credit clause, in a divorce case, unless there is a substantial and real connection with the State. Is one year's residence enough? That is not this case. All that needs to be decided here is that six weeks' residence, without domicile, is not enough."

The Amicus' discussion of *Crownover* v. *Crownover*, 274 P. 2d 127 (N. M. 1954) illustrates the problems that arise unless the usual rule of according great latitude to legislative determinations is applied here. The Amicus apparently approves of *Crownover* (Am. Br. p. 20). That case involved the New Mexico divorce law which requires residence for one year and domicile as a basis for jurisdiction. The statute contains a *proviso* that persons "who have been *continuously stationed* in any military base or installation in the state of New Mexico for such period of one (1) year, shall for the purpose hereof, *be deemed residents in good faith* . . ." (Italics supplied).

The plaintiff in *Crownover* had been "stationed" at Sandia Base in New Mexico for about 13 months before filing his petition for divorce. He was physically present there for the first seven months, then absent on duty in the Pacific for the next six months, after which he returned to duty at the base five day before filing the complaint (274 P. 2d at 128, 131). The court held that the plaintiff satis-

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[46] See pp. 12-13, *supra*.

fied the statutory requirements and that the law was constitutional.

The Amicus states that in this type of situation, "the connection with the State is real and substantial." (Am. Br. p. 37). We agree that statutes like those involved in *Crownover* and in *Craig* v. *Craig*, 143 Kan. 624, 56 P. 2d 464 (1936) (Pet. Br. p. 38), are constitutionally unobjectionable, but we note the following points: (1) The period of actual physical presence in *Crownover* was not "long-continued", but only about six months. (2) There was no claim of domicile or domiciliary intent. (3) Presumably, the plaintiff did not go to New Mexico, as a matter of free will, but was assigned there. In any event, as the court recognized (274 P. 2d at 133), the statute is designed to provide jurisdiction for people who have no intention to stay in the state. Most persons in the armed forces do not choose to go to their base, but are assigned there, and there is no reason whatever to assume that they intend to remain or that they do not retain their domicile in another state. (4) The statute permits *ex parte* petitions. It does not require that both parties shall reside in the jurisdiction.[47]

We respectfully suggest that it would be exceedingly difficult, and of debatable wisdom, to establish a rule of law which would tolerate the statute in *Crownover* and similar situations,[48] and reject the Virgin Islands law. We again emphasize that the Virgin Islands' provision requires a "connection", and in the sense of general jurisdiction, between the defendant and the jurisdiction, as well as preserving the established period of continuous residence required

[47] The defendant appeared generally and contested in *Crownover*. The statement of Amicus that the statue authorizes jurisdiction where "the parties" are stationed at a military base must mean where "one of the parties" is stationed there.

[48] See *David-Zeiseniss* v. *Zeiseniss*, 129 N.Y.S. 2d 649, 205 Misc. 836 (Sup. Ct. 1954), discussed Pet. Br., pp. 38-39, and the English Statutes cited Pet. Br., pp. 36-37.

as to the plaintiff. The constitutional limits of legislative action are not so arbitrary or constrictive as to permit this statute to be forbidden and *Crownover* approved.

a. In any event, the statutory provision does not violate any constitutional provision.

In our principal brief, we have set forth our affirmative argument in support of the constitutionality of the second provision of the statute. Addressing ourselves to the points made in the learned opinion below, we argued that the due process clause may not be applicable because no person's rights are infringed. If it is, the legislature has "unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it sees fit to all who meet its statutory requirements" (Concurring opinion, per Murphy, J., *Williams* v. *North Carolina (II)*, 325 U. S. 226, 239).[49] We pointed out that the purpose and effect of the statute are extremely limited: that is, in specified circumstances to eliminate the requirement of proof of domiciliary intent;[50] and that the second provision, dispensing with domicile, has the extremely beneficial objective of excluding *ex parte* proceedings from its scope.

We further argued that the question whether a decree under this provision would be entitled to compulsory recognition by the states under full faith and credit was irrelevant because this case involves only jurisdiction to hear the case and no issue of external application.

In any event, we disagreed with the court below that in this type of case "due process at home and full faith and credit in another state are correlative" (207 F. 2d at 676). We submitted that full faith and credit would be accorded

[49] See Pet. Br., pp. 30-32.

[50] The court below remarked that in certain states "the court's finding of domicile is usually contrary to the fact and frequently is based upon evasive or even perjured testimony". 207 F. 2d at 673.

to a decree under the statutory provision, entered after compliance with all of the jurisdictional requirements specified by the statute. We pointed out that under the decisions of this Court it was entirely clear that such a decree could not be collaterally attacked because, under the terms of this provision of the statute, it could not be entered unless the defendant had been served within the district or entered a general appearance.[51]

We believe that these considerations, elaborated in our principal brief, are entirely persuasive of the validity of the statute. As we read the brief of the Amicus we find it difficult to discern his disagreement with them. The Amicus agrees that domicile is not necessary to the constitutionality of a statute providing for divorce jurisdiction. He does not argue that the due process clause renders unconstitutional the specific provisons of the law providing for jurisdiction.[52] He does not make the point that a decree under his statute, assuming that it is otherwise constitutional and valid, would not be entitled to full faith and credit. We assume that the Amicus abandons the reasoning of the majority below in these respects because he does not sponsor its adoption by this Court.

Instead, the Amicus' constitutional objection to the legislation, other than those involved in his *ultra vires* argu-

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[51] In *Cook* v. *Cook*, 342 U. S. 126, both the Court and the dissenting opinion (per Frankfurter, J.) agree, as we read the case, on the following statement by Mr. Justice Frankfurter: "It is inconceivable that the Vermont courts did not know that *the fraudulent claim of domicile by a divorcing spouse is irrelevant to the enforceability in sister States of a decree of divorce if the other spouse contests or consents to the proceeding leading to the decree.*" (Emphasis supplied). (342 U. S. at 131-132). In our principal brief we state our belief that *Williams II* is confined to cases where the defendant had not appeared or been served with process in the state. *Cf. Cook* v. *Cook*, *supra*, at 128.

[52] He argues the relevance of the due process clause of the Organic Act only with respect to the question of the scope of authority of the Virgin Islands legislature, p. 16, fn. 21, *supra*.

ment is that the statutory provision authorizes divorce jurisdiction based solely upon six weeks residence and general jurisdiction of the defendant; that *in such a case*, absent domicile or some additional connection with the forum, the law of some other state would have to be applied; and that this renders the provision unconstitutional.

b. Full faith and credit considerations do not invalidate the law.

At two places in his brief, the Amicus acknowledges that his argument that under the instant statutory provision the law of the forum could not be applied, is without precedent or antecedent. (Am. Br. 35, 42)[53]

At page 42, he says: "The problem of the Full Faith and Credit clause [in terms of the choice of substantive law that must be applied, see p. 41] has not been involved in divorce (apart from the question of recognition of divorce decrees, which is not the question here), because the States have proceeded on the basis of domicile."[54] This application of the law of the forum in traditional domicile cases, he says, "is not inevitable, but it has clearly been the law" (Am. Br. p. 42). But where neither domicile nor a substantial or real connection exists, Amicus argues that this should not be the law.

Amicus undoubtedly realizes that whether or not Virgin Islands law or the law of some state should govern the disposition of the Granville-Smith divorce action is not the issue before the Court. The issue is whether the District Court has jurisdiction; not which law should be applied. The District Court dismissed the complaint for want of jurisdiction (R. 13). It did not consider the merits or apply any law to the case.

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[53] At p. 35, Amicus states: "It is true that the Full Faith and Credit clause has not been regarded as having application to divorce legislation."

[54] The bracketed material has been added; the material in parentheses appears in Amicus' brief.

The Amicus, however, considers that his point is relevant apparently on the following reasoning: The statute is silent on the question of the law to be applied to divorce actions brought under its provisions; the legislature must have intended that Virgin Islands law be applied; the application of Virgin Islands law would deny full faith and credit to the laws of other jurisdictions; and the statute is therefore unconstitutional.

We disagree with Amicus' basic proposition that Virgin Islands' substantive law cannot be applied under this statute. We believe that this is the proper law to be applied in all cases brought under the statute[55] because there is a reasonable connection between the Virgin Islands and the parties, and because if jurisdiction to divorce exists (which is to be determined by considerations other than choice of law) it follows that the law of the forum is to be applied. In addition, even if *arguendo* we accept Amicus' theory as to choice of law, Virgin Islands substantive law is the correct law to be applied in many or most cases brought under the statute because it is the only jurisdiction with any connection with the parties, either because they are natives or because the record does not make a case for another jurisdiction. In any event, the Amicus' argument could at most mean that in appropriate cases, some law other than that of the Virgin Islands' would have to be applied. It does not follow that the statute is unconstitutional generally, or as applied to the facts of this case. We shall discuss each of these points.

(1) Amicus' argument as to the choice of law, even if it were valid, does not lead to the conclusion that the statutory provision is unconstitutional. We know of no case in which a statute has been held unconstitutional because, under its provisions, full faith and credit required the ap-

[55] We again recall that, in our opinion and on the analysis of the Court below, only the second provision of the statute is involved in Amicus' argument, since the first provision (the procedural presumption) requires domicile.

plication of the law of another jurisdiction. The cases cited by the Amicus, to the extent that they are relevant (Am. Br. pp. 39-40), merely relate to the choice of law required under certain types of statutes, and not to the constitutionality of the statutes themselves. Even in cases like *Home Insurance Co.* v. *Dick*, 281 U. S. 397, this Court merely ruled, on the facts of that case, that the Texas statute violated due process as applied to the particular contract.[56] Obviously, under the present statute, even if it were true (which we deny), that in some cases, the court would be compelled to apply the law of another jurisdiction, it would not follow that the statute is unconstitutional.

In many, if not most cases arising under the instant provision, the substantive law of the Virgin Islands would have to be applied, even on Amicus' theory. The provision is available to and used by people domiciled in the Virgin Islands and by persons who were married and have lived there. Persons who were born in the Virgin Islands and who have never gone outside of the Islands may, and do, seek divorces under the provision.[57] In such cases the Amicus would undoubtedly agree that Virgin Islands substantive law would apply, even though the parties and the court would proceed under the statutory provision and would not be concerned with evidence as to domicile.

In addition, in the usual case that would arise under the statute, there would be no claim that the law of another

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[56] The Court was careful to note that "The claims here asserted are not based upon the full faith and credit clause." 281 U.S. at 411. The Amicus' use of this case on p. 39 of his brief is not justified.

[57] Cf. *Burch* v. *Burch*, 195 F. 2d 799 (C.A. 3, 1952) and *Berger* v. *Berger*, 210 F. 2d 403 (C.A. 3, 1954), in which the parties were domiciled on the Islands. The clerk of the district court has informed counsel that out of a total of 9 divorce cases filed in January, 1954, (while *Alton* was pending), 3 were filed by persons born in the Virgin Islands and 2 by persons who were married there.

jurisdiction should apply, and no facts upon which to choose such jurisdiction or to base the application of its law. The present record illustrates this type of case.[38] In such a situation, it is clear that the Virgin Islands' law should be applied, even if we accept, *arguendo*, the Amicus' reasoning. We know of no case in which full faith and credit has been held to require the application of foreign law in the absence of a claim asserted by a party and record facts to establish the superior claim of another jurisdiction. Such a doctrine would be as disruptive as it is startling.

(2) Analysis of some problems that would be attendant upon the choice and application of the substantive law of jurisdictions other than that of the forum demonstrates that there is no reason in policy to support Amicus' contention, and that it would be impossible of administration.

We do not emphasize the latter point—the burden that would be placed upon the District Court if it were called upon to determine which law should be applied and what the law is in the various states. The burden would be

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[38] The record shows that Mrs. Granville-Smith became a resident of St. Thomas on February 1, 1953 (R. 8). She filed her petition on March 16, 1953 (R. 1). There is no reason to assume she was "domiciled" elsewhere at that time, although, of course, she may have been. Even Amicus' search of the Manhattan telephone books does not refute the hypothesis, if one chose to advance it, that Mrs. Granville-Smith had no other "home" during the relevant period. The October, 1952, directory does not show a listing for her in New York. (Am. Br. footnote 9, p. 22). She is listed in the October, 1953 directory. The relevant period would be between the 1952 and October 1953 directories. Amicus' research invites the possibility that Mrs. Granville-Smith left "home" in New York or some other place some months prior to taking up residence in St. Thomas and came to New York only after her divorce proceedings were halted by the District Judge's announcement on March 20, 1953 (See Pet. Br. 8). The record does not show this. We do not assert it as fact, but merely as analysis of Amicus' statements in the cited footnote.

impossible and the statute would be nullified. Analysis of the problems is of interest because it vividly demonstrates that there is at least an insistent question as to whether some identifiable jurisdiction other than the forum has a clear, identifiable stake in the divorce of two persons who have submitted their problem to the District Court in the Virgin Islands and one of whom has taken up residence there for at least six weeks. Some of these problems are:

Which is the jurisdiction whose laws would be applied? On what basis would it be selected? Suppose the husband and wife had different domiciles. Would the happenstance of which one was the plaintiff determine the choice of law? If so, how about the policy and law of the defendant's domicile? (*Cf.* Pet Br. p. 41). Suppose the wife or the husband had left the matrimonial domicile, rightly or wrongfully, lived in another state for a substantial period without domiciliary intent, and had then become resident in the Virgin Islands where he or she filed a petition for divorce. Which is the state whose policies are so involved as to require that its substantive law be applied? Suppose in any of these situations or in many others that may be thought of, that there is a difference between the state of domicile and the state of greater connection? Is the law of the state of domicile to govern? How about the "policy" of the other jurisdictions?

Suppose, as sometimes happens, that the wife files a petition and intends to remarry and live in another state. Are the law and policy of that state entitled to consideration, even though she may never have been there and cannot be considered as domiciled there? Or suppose that the plaintiff has no fixed idea as to where he or she will live after divorce? Must a domicile be assigned, and if so, what purpose will be served?

Suppose that the cause of action, upon which the petition is predicated, arose in a state other than that of domicile. Would it be mandatory or permissible to apply that state's law in order to vindicate its policy in respect of people guilty of wrongful conduct within its borders?

Suppose the parties were married in the Virgin Islands,[59] or that the Virgin Islands is the place where the cause of action arose. May it apply its law in such cases? If not, what of its policy interests? If so, what of the policy interests of the domicile or domiciles of the parties, whatever those jurisdictions may be?

We believe that these illustrations will suffice to make the point. The proposal as to choice of law that Amicus would introduce into the jurisprudence of divorce would be impossibly and fantastically vexatious, difficult and complex. But more than this, consideration of the questions that would arise lays bare the illusive quality of the concept of a paramount interest of some jurisdiction, other than the forum, in the dissolution of the bonds of matrimony. We wish to make it clear that we do not reject the social and political thesis that the state in which husband and wife live has a deep concern with their marriage. But we earnestly submit that in our federalized system, in our highly volatile and mobile society, with our established views as to the separate rights of husband and wife, any attempt to translate this thesis into a principle of constitutional law to govern divorces serves no real purpose. On the contrary, it would create havoc.

3. There is no support for Amicus' assertion that Virgin Islands law could not be applied to divorce proceedings under the instant provision. The Amicus recognizes that "No case is known which requires a State to look to the law of any other State in determining whether a divorce should be granted." (Am. Br. p. 35). We submit, first, that a forum with lawful jurisdiction to divorce may apply its own substantive law, whatever its specific jurisdictional requirements may be; and second, if we assume that in addition to lawful jurisdiction, the forum must have a "substantial or real connection" with the subject in order

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[59] In 1952, 237 marriages were celebrated in the Virgin Islands (Op. cit. p. 3, *supra*, at p. 53). See Pet. Br. 38-39; Am. Br. 37, footnote 16.

to apply its own laws, that requirement is fulfilled by the present statute. There is nothing in the statute under consideration which requires or justifies a departure from this rule.

In the first place jurisdiction to divorce means by definition, jurisdiction of the marital status;[60] and jurisdiction of the status means that the law of the forum may be applied.[61]

The cases which Amicus cites at pages 39-40 of his brief are of no utility to the present issue. We agree that "this Court has decided in a large number of cases that States must give full faith and credit to the laws" of other States (Am. Br. 39). We agree that in some of them, but by no means all, this Court has required a state to apply the laws of a sister state because of the latter's intimate connection with the transaction. However, in other cases, other considerations have been determinative.[62] The fact of the matter is that the Court has decided these cases with conspicuous particularity. Decisions have been reached after weighing specifically the type of case; the nature of the issues; the policies of the states; the

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[60] In using this term, we are mindful of its limitations. See *Estin* v. *Estin*, 334 U.S. 541. It is, of course, beyond dispute that jurisdiction of the marital status for divorce purposes may be acquired and exercised if there is appropriate jurisdiction over only one spouse. The bond of matrimony may be severed at either the wife's or the husband's position.

[61] We suggest that the Amicus' contention that *since* the law of the forum cannot be applied, *therefore* jurisdiction does not exist, is an ingenious and unwarranted inversion of this simple proposition.

[62] The law of the state of incorporation has been applied in the fraternal benefit society cases in order to preclude inequality of rights and obligations as between members. *Order of United Commercial Travelers* v. *Wolfe*, 331 U.S. 586, 605-606, 610; *see* also *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U.S. 493, 504.

relative merits of the claims as to the law to be applied; and the conflicting values involved. In divorce cases, although the question has never been before this Court, it has always been the rule that the laws of the forum will be applied. The Amicus concedes this (Am. Br. p. 35).

Indeed, if any general rule as to choice of law is to be formulated, it is probably that a jurisdiction is "free to determine whether a given matter is to be governed by the law of the forum or some other law." *Klaxon* v. *Stentor Electric Mfg. Co. Inc.*, 313 U.S. 487, 497. This Court will interfere with the decision of the forum only when compelling considerations are present.

We have already indicated some of the difficulties that would arise if we must apply to cases under the Virgin Islands statute the law of other jurisdictions. Indeed, Amicus' suggestion that there should be applied in this field the subtle, involved, and varient conceptions as to choice of law and full faith and credit in other fields would open an entirely new area of constitutional attack, further to plague the law relating to divorces.[63] It by no means follows that, as the Amicus fleetingly implies (Am. Br. 42), that states of "domicile" would be immune from application of the principle. Domicile would establish jurisdiction to divorce, but if it could be shown that another state had a closer connection with the parties, it might well be argued, by analogy with the choice of law cases in other fields, that the law of the latter state must be applied.

Indeed, if something more than jurisdiction to divorce is needed, why does "domicile" supply that something

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[63] Mr. Justice Jackson, in a stimulating article to which Amicus' quote (Br. 43-44) does not do justice, confessed that he could not "discern any consistent pattern or design into which the cases [in this field] fit." Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Col. L. Rev. 1, 16 (1945). Subsequent decisions of this Court are helpful, but the field is still one of great difficulty and complexity.

more? In states like Nevada and Florida, "domicile" adds to the Virgin Islands' requirement only the element of "domiciliary intent." It does not import a substantial and real connection in the sense in which Amicus uses the term. Certainly, it would not be conclusive of the required law that must be applied under full faith and credit if the analogy of cases in other fields is to be applied.

In the second place, even if Amicus' theory is accepted, and it were thought that application of the forum's law requires a substantial connection between the jurisdiction and the parties, that requirement is satisfied by the instant provision. It retains exactly the same period of residence or continuous presence which was provided in the Virgin Islands law and in other jurisdictions for a number of years, p. 34 *supra*. It *adds* to the requirements which previously obtained and to the requirements of states providing for domicile, an insistence upon a connection with the defendant as well as the plaintiff, by providing that he must be personally served within the district or have entered a general appearance in the action. Certainly, there is no reason whatever in these circumstances to indicate any doubt that the rule as to choice of law would be any different in this case than it is in jurisdictions with familiar statutes.

We do not believe that logic either compels or justifies such a differentiation. The consequences of such a conclusion would, of course, destroy the statutory provision and require a reversion to the ritual of domicile.

We do not believe that the effort of the Virgin Islands legislature to escape the Nevada pattern by eliminating the requirement of proof of domiciliary intent deserves this fate, whether it is accomplished by a direct ruling on constitutional grounds or indirectly by challenge to the question of choice of law. On the contrary, we believe that logic and policy indicate that this Court should affirm the right of the Virgin Islands legislature to enact this statute

and confirm the usual and established rule that the law of the forum applies to proceedings for divorce.

We may deplore the policies of states which prescribe short periods of residence as a pre-condition to divorce proceedings, and regret the conditions which bring about such policies. We may wish that there were uniformity among the states or that all legislatures would prescribe a longer period. But under our system of government the prescription of these periods is a matter for the determination by the state and territorial legislatures. It is not subject to the dictation of the courts.

This is the true implication and requirement of our federal system: not, as Amicus suggests, that the federal constitution be used to impose upon our divorce jurisdictions some general policy conceptions; but that each of them should be allowed to pursue its separate policies. Under the Constitution, as Chancellor Kent put it, "The appeal must be made to the mutual comity, moderation, and forebearance of the legislatures of the several states in their respective regulations on the subject of divorce." Kent, *Commentaries on American Law*, 119 (1823).

CONCLUSION

For the foregoing reasons and the reasons stated in Petitioner's Brief, we respectfully submit that the judgment of the Court below should be reversed.

Respectfully submitted,

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APPENDIX

Table I

NUMBER OF DIVORCES BY STATE FOR YEAR 1952[1]

UNITED STATES	2392,000
NEW ENGLAND	13,818
Maine	2,207
New Hampshire	1,119
Vermont	610
Massachusetts	6,003
Rhode Island	1,026
Connecticut	2,853
MIDDLE ATLANTIC	—
New York	—
New Jersey	5,036
Pennsylvania	11,946
EAST NORTH CENTRAL	—
Ohio	21,854
Indiana	12,789
Illinois	24,188
Michigan	314,925
Wisconsin	—
WEST NORTH CENTRAL	31,784
Minnesota	4,004
Iowa	5,596
Missouri	12,943
North Dakota	590
South Dakota	936
Nebraska	2,403
Kansas	5,312
SOUTH ATLANTIC	—
Delaware	547
Maryland	4,934
District of Columbia	1,186
Virginia	7,834
West Virginia	—
North Carolina	5,857
South Carolina	—
Georgia	29,000
Florida	20,468
EAST SOUTH CENTRAL	—
Kentucky	—
Tennessee	7,754
Alabama	9,076
Mississippi	5,419
WEST SOUTH CENTRAL	—
Arkansas	—
Louisiana	—
Oklahoma	213,174
Texas	337,300
MOUNTAIN	229,563
Montana	1,989
Idaho	2,586
Wyoming	31,250
Colorado	24,500
New Mexico	2,940
Arizona	4,905
Utah	2,263
Nevada	9,130
PACIFIC	57,019
Washington	9,310
Oregon	6,311
California	41,398

[1] Source: Summary of Marriage and Divorce statistics, United States, 1952, Vol. 40, No. 3, p. 52 (U. S. Dept. of Health, Edu., and Welf., Nat'l Office of Vital Statistics, Dec. 6, 1954). The figures include reported annulments.

[2] Estimated.

[3] Incomplete.

Table II*

NUMBER OF DIVORCES IN ALASKA, HAWAII, PUERTO RICO, AND VIRGIN ISLANDS FOR YEAR 1952

Alaska	454
Hawaii	1,300
Puerto Rico	14,173
Virgin Islands	343

* Source: Op. cit. Table I, fn. 1, at p. 53.

[1] Excludes annulments.